Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 302 of	)	CS Docket No. 96-46
the Telecommunications Act of 1996	)	
	)	
Open Video Systems	)	

U S WEST, INC. COMMENTS ON OPEN VIDEO SYSTEMS

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SUMMARY

U S WEST, Inc. believes that the Federal Communications Commission ("Commission") should allow open video system ("OVS") operators as much latitude as possible within the statutory constraints adopted by Congress. The driving force behind the Telecommunications Act's OVS provisions was the desire to introduce greater competition into the market for cable service. The Commission should not stifle this potential competition by adopting a wide array of rules in anticipation of every conceivable harm that could befall video programming providers, end users and competitors. Rather, the Commission should only adopt rules where it finds that current market forces are insufficient to constrain the actions of OVS operators. Even in such cases, the Commission should incorporate "sunset" provisions in its rules so that an additional rulemaking is not required to eliminate rules whose utility is outpaced by technological developments.

A repeat of the video dialtone experience would not serve anyone's interest. Congress intended OVS to be something quite different from a traditional Title II common carrier service. In a non-common carrier environment, any limitations on the local exchange carrier's ("LEC") speech are constitutionally suspect. Given that the statute limits an OVS operator to one-third of capacity when demand exceeds supply, the Commission should do no more than is demonstrably necessary to fulfill its purpose. Any other course of action would invite future challenges at a time when scarce Commission resources must be scrupulously preserved.

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I. INTRODUCTION

U S WEST, Inc. ("U S WEST") comes to this proceeding[1] with a unique dual perspective. On the one hand, U S WEST Communications, Inc. ("USWC") has a video dialtone (or "VDT") market trial in progress in Omaha, Nebraska. Notwithstanding the relative success of that trial, USWC knows from experience why video dialtone failed as a model for local exchange carrier ("LEC") entry into the video programming distribution business. On the other hand, U S WEST Media Group, Inc. ("USWM") holds cable properties in Atlanta through MediaOne, Inc., and many other properties outside of the USWC region will soon become part of USWM as a result of the pending merger with Continental Cable. Most, if not all, of USWM's present and future cable franchises are subject to periodic renewal. As

[1] In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266 (Terminated), Report and Order and Notice of Proposed Rulemaking, FCC 96-99, rel. Mar. 11, 1996 ("Notice").

a result, U S WEST has evaluated open video systems (or "OVS") both from the LEC perspective, and from the incumbent cable company perspective.

It did not take U S WEST long to decide that OVS should not be a LEC-only option. Now that LECs are permitted to provide video programming as a cable system under Title VI, it seems only fair that a cable company should be permitted to operate an open video system. Indeed, this is desirable, for cable companies should also have alternatives for the delivery of video programming to consumers. No cable service provider should be "locked in" to one option while everyone else has choices.

Until recently, LECs had only one option -- video dialtone -- and were prohibited from providing video programming directly to subscribers. The video dialtone rules, however, "implemented a rigid common carrier regime, . . . and thereby created substantial obstacles to the actual operation of open video systems."[2] Furthermore, the cross-ownership rules infringed LEC speech and were found to be unconstitutional in numerous court proceedings.[3] In wiping the video dialtone rules off the books and repealing the cross-ownership rules, Congress sent

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[2] S. 652, 104th Cong., 2d Sess., Conference Report at 179 (Jan. 31, 1996) ("Conference Report").

[3] See, e.g., Chesapeake & Potomac Telephone Co. of Virginia v. United States, 42 F.3d 181 (4th Cir. 1994), cert. granted,; U S WEST, Inc. v. United States, No. 94-35775 (9th Cir. Dec. 30, 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); NYNEX Corp. v. United States, Civil No. 93-323-P-C (D. Me. Dec. 8, 1994).

a clear message to the Federal Communications Commission ("Commission"): let's start over, and let's get it right this time.[4]

In its 35-page Notice, the Commission raises so many questions and proposes such a myriad of regulation that one questions whether OVS can survive, let alone prosper under this onslaught. The magnitude of suggested regulation is striking given that in providing OVS, LECs will be new entrants with no market share in a developed market (i.e., the market for delivery of entertainment services to the home) with a dominant provider (i.e., incumbent cable operator). Additionally, LEC deployment of OVS will be a trigger which allows entrenched cable companies to obtain relief from rate regulation.[5] Pervasive regulation of OVS in such an environment makes no sense.

True, the statute leaves many questions unanswered about how OVS will actually work in practice. But Congress did not intend for the Commission to fill gaps with rules. Congress clearly intended that the regulatory obligations of OVS would be "reduced" and "streamlined"[6] so that common carriers will be encouraged "to deploy open video systems and introduce vigorous competition."[7] Imposing unwarranted regulatory requirements would defeat that purpose.

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[4] Congress' decision to limit an OVS operator to one-third of capacity if demand exceeded capacity is constitutionally suspect given that an OVS is not common carriage. Assuming that the statute is lawful (and U S WEST does not concede that it is), the Commission should adopt only those rules that are demonstrably necessary to carry out the purpose of the statute.

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 § 653 (1996)

II. OVS CARRIAGE RATES WILL BE MARKET-BASED, REGARDLESS OF COMMISSION ACTION, AND NO RULES ARE NEEDED TO ENSURE NON-DISCRIMINATION

Section 653 requires the Commission to ensure that the rates, terms and conditions for carriage of programming are just and reasonable, and not "unjustly or unreasonably discriminatory."[8] U S WEST urges the Commission to rely on market forces and its substantial experience in analyzing discrimination claims -- coupled with its wide-ranging enforcement power -- in fulfilling this mandate. Although Congress adopted language similar to that used in Title II, it specifically provided that OVS operators shall not be regulated as common carriers.[9] While the Commission never directly asserts authority to regulate OVS rates, suggestions for a "specific framework" or a "formula" for OVS operators to apply in setting rates come dangerously close to rate regulation.[10] No such regulation is needed.

A. The Market Will Constrain OVS Rates

The issue of a carrier's ability to engage in price discrimination is not new to the Commission. This issue was the "heart" of the Competitive Carrier proceeding

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[8] Telecommunications Act, 110 Stat. at 122 § 653(b)(1)(A).

[9] Telecommunications Act, 110 Stat. at 124 § 653(c)(3): "the requirements of this section apply in lieu of, and not in addition to, the requirements of Title II." The legislative history reinforces this notion: "The conferees do not intend that the Commission impose title II-like regulation under the authority of this section." Conference Report at 178.

[10] Notice ¶ 31.

which was initiated in 1979.[11] In that proceeding the Commission found that many carriers simply did not have the ability to discriminate unreasonably because they lacked market power.[12] Market power was defined as the "ability to raise prices by restricting output."[13] Carriers with little or no market share were found to lack market power and were classified as "non-dominant" -- thereby relieving them of traditional cost-based tariff support requirements.[14] Since then the Commission has used this same analysis to find that AT&T Corp. is a "non-dominant" provider of interexchange services.[15] Clearly, it is impossible for OVS operators (i.e., new entrants) to engage in unreasonable price discrimination under the Commission's traditional analysis. As such, no rules are necessary -- the market will constrain OVS prices.

As a result, there is no need for the Commission to adopt any guidelines on what constitutes "unjust and unreasonable" discrimination, nor should the Commission adopt a "specific framework" for ensuring that OVS carriage rates are just and reasonable. The Commission cannot anticipate the many situations in

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[11] In the Matter of Policy and Rules concerning rates for competitive common carrier services and facilities authorizations therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979), First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), recon., 93 FCC 2d 54 (1983), Third Report and Order, 48 Fed. Reg. 46,791 (1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 98 FCC 2d 1191 (1984), Sixth Report and Order, 99 FCC 2d 1020 (1985).

[12] Fourth Report and Order, 95 FCC 2d at 555 ¶ 2.

[13] Id. at 558 ¶ 7.

[14] First Report and Order, 85 FCC 2d at 1.

[15] In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, FCC 95-427, rel. Oct. 23, 1995.

which a price difference would be legitimate. Instead, the OVS operator should be permitted to exercise it business judgment and establish appropriate mechanisms for satisfying its non-discrimination obligations. An aggrieved video program provider ("VPP") can always file a complaint if it suspects unfair treatment and is unable to resolve the matter directly with the OVS operator.

If the Commission determines that it must examine OVS rates in order to fulfill its statutory duty, U S WEST strongly urges the Commission to avoid traditional Title II tariff analysis which assumes the provider is a sole provider unconstrained by the market. This assumption would be nonsensical in the OVS context given that the Act relieves incumbent cable operators of price regulation upon the entry of an OVS operator.[16] For burden-shifting purposes, U S WEST supports the idea of establishing a presumption of lawfulness regarding the OVS operator's rates, as suggested in paragraph 31 of the Notice. Pegging the presumption on the number of VPPs who pay the rates, or on the amount of capacity taken by unaffiliated programmers, may raise however, questions about "how many or how much is enough?" Alternatively, there could be a presumption that a rate is lawful if it falls within an acceptable range relative to retail prices, not the provider's costs. In any event, the burden should be on the complaining party to prove that the rate was "unjustly and unreasonably discriminatory."

[16] Telecommunications Act, Section 301, 110 Stat. at 115, amending Section 623(l)(1) of the Communications Act of 1934.

Because it would be intrusive and unnecessary, U S WEST opposes the Commission's tentative conclusion that an OVS operator be required to make its contracts with all VPPs "publicly available."[17] Forced disclosure of privately negotiated contracts smacks of Title II-like regulation. OVS operators are supposed to qualify for reduced regulatory burdens under Title VI, and even cable operators are not required to make their contracts with programmers publicly available. These contracts can and often do contain proprietary information, and the operator should be entitled to decide when and how to reveal such information. When confronted with a bona fide claim of discrimination, the OVS operator would have every incentive to resolve the dispute short of formal process, and to provide whatever information is necessary to satisfy the aggrieved programmer that no unlawful discrimination has occurred. The aggrieved VPP always has the option of filing a formal complaint, and can then gain access to all relevant information.

B. Cost Allocation Is Not Relevant To The Pricing Of OVS Services

The ghost of video dialtone makes an unwelcome appearance in paragraph 70 of the Notice. There, the Commission asks for comment on what steps OVS operators should be required to take prior to certification with respect to establishing cost allocation procedures between regulated and unregulated services.[18] Cost allocation was a major issue in the video dialtone proceeding, but

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[17] Notice ¶ 34.

[18] Id. ¶ 70.

OVS is quite different from VDT in that it is not subject to Title II common carrier regulation. Section 653(c)(3) of the Act specifically exempts OVS systems from Title II regulation.[19]

As a result, cost allocation should serve only one purpose in an OVS setting -- to ensure that an OVS operator's regulated telephone business is not bearing a disproportionate share of the cost of commonly used network infrastructure. Cost allocation should play no role in the pricing of OVS service. As discussed above, OVS prices will be determined largely by the market (i.e., the price that the incumbent cable operator is charging its subscribers for cable service). The surest way to kill OVS as a competitive alternative is to start down the same cost allocation path that the Commission traveled in the video dialtone proceeding. Clearly, Congress intended to avoid this path when it crafted the OVS provisions of the Act.[20] As such, the Commission should require no more than a statement in an OVS provider's application that the provider will comply with all applicable accounting rules.

C. Common Cost Issues Should Be Addressed In A Separate Proceeding

U S WEST does not question the need for allocating common costs between telephony and video in those states where telephone operations are still subject to

[19] Telecommunications Act, 110 Stat. at 124 § 653(c)(3).

[20] "[T]he conferees recognize that common carriers that deploy open systems will be 'new' entrants in established markets and deserve lighter regulatory burdens to level the playing field." Conference Report at 178.

rate of return regulation. Part 64 appears to work reasonably well for assigning costs between unregulated (and enhanced) and regulated services in most instances. For example, Part 64 rules are being used to assign costs between Level 1 services (i.e., video transport) and Level 2 services (e.g., customer premises equipment, inside wire, billing, promotion, etc.) in USWC's VDT trial in Omaha.

U S WEST expects that Part 64 would continue to be used to assign costs to unregulated and enhanced services provided in conjunction with video transport under OVS. The issue is how costs associated with the underlying common transport infrastructure should be assigned to video and telephony.[21] This same question arises whether a LEC becomes an OVS operator or acts as both a telephone common carrier and a cable operator using an integrated network, as the law allows. The Commission has indicated that it plans to address this cost allocation issue in a separate proceeding. A comprehensive approach to cost allocation makes sense given that the Commission is faced with many other cost allocation issues as a result of the new legislation. Furthermore, when Part 64 was adopted, unregulated services were largely ancillary to basic telephone services and represented a very small proportion of the overall business of telephone common carriers. It is appropriate that the Commission reexamine Part 64 in light of large-

[21] As noted above, cost allocation is relevant only where a common carrier's telephone operations are subject to rate of return regulation. Outside of such an environment, common carriers face the same problem that every other business does. That is, they must cover their common costs or eventually go out of business.

scale regulated/unregulated operations that may be sharing a common infrastructure.

III. OVS CAPACITY REGULATIONS SHOULD BE MINIMIZED

U S WEST knows from experience that video programmers do not view analog and digital channel capacity as substitutable given the present state of technology.[22] At some point in the future, when digital standards are established and incorporated into set-tops and other peripheral devices, digital programming will most likely replace analog programming and there will be no need to distinguish between the two for capacity purposes. Furthermore, with the advent of video switching (i.e., switched digital) it will be meaningless to focus on channel capacity constraints. In such a world, channel allocation, channel limits and channel sharing are unnecessary. For example, the Act's limitation on an OVS operator's use of channel capacity is unlikely to be triggered if a switched digital architecture is utilized since demand is unlikely to exceed OVS capacity. Thus, if the Commission finds it necessary to adopt rules at this time on channel allocation, channel sharing and channel limits, these rules should be structured to contain sunset provisions which will be triggered when the rules are no longer necessary (e.g., where an OVS provider uses switched-digital technology to deliver video signals to the home).

[22] In USWC's Omaha VDT trial, analog capacity was over-subscribed and had to be allocated while digital capacity was freely available and barely used.

A. OVS Operators Should Be Given Substantial Latitude In The Assignment And Management Of Capacity -- Even Where Demand Exceeds Capacity

The Act limits an OVS operator from selecting video programming on more than one-third of an open video system's capacity when demand exceeds capacity.[23] The Commission raises numerous questions associated with this statutory constraint, including: (1) how capacity is defined; (2) when OVS capacity should be reallocated when demand increases; (3) whether an OVS operator should be permitted to administer the allocation of channel capacity; (4) whether an OVS operator can limit or preclude a competing cable operator from obtaining capacity on an OVS; (5) whether an OVS operator should be permitted to establish minimum or maximum limits on the amount of capacity that an unaffiliated video programmer may obtain; and (6) whether the Commission should prescribe any terms and conditions under which channels will be shared.[24]

If one starts from the premise that OVS was meant to provide a competitive alternative to existing cable services, several straightforward conclusions follow. First, if the market demands analog capacity rather than digital (as demonstrated by a shortage of analog capacity and excess digital capacity), the Commission should treat these classes of capacity separately for purposes of enforcing statutory non-discrimination and OVS operator capacity constraints.

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[23] Telecommunications Act, 110 Stat. at 122 § 653(b)(1)(B).

[24] Notice ¶¶ 9-27.

Second, if demand for OVS capacity increases after initial channel assignment or allocation, there is no question that capacity should be reallocated at some point if the Act's non-discrimination requirement is to be satisfied. The relevant question is: when? No video programmer or OVS operator will be willing to make a commitment to use OVS as a delivery mechanism unless there is some certainty that they will have a fair opportunity to earn a profit. U S WEST believes that a three-year period is the absolute minimum necessary to attract VPPs to OVS with a five-year period being more economically reasonable. Holders of OVS channel assignments should thus have the opportunity to use these channels for up to five years without the fear of losing them through a reallocation process. Without such assurance, OVS operators and VPPs will simply "decline to play the game," and wireline competition will never develop.

Third, there is nothing inherently wrong with allowing an OVS operator to administer the allocation of OVS capacity. The OVS operator took the risk of building the system and should be allowed to allocate capacity so long as it is done in a non-discriminatory manner. Requiring the OVS provider to turn over to a third party the administration of channel capacity would deter all but the most ardent potential OVS providers.

Fourth, there is no question that an OVS operator should be permitted to limit or preclude, in the absence of Commission regulations, the competing cable

operator's ability to obtain capacity on the system.[25] Section 651(b) of the Telecommunications Act provides:

> A local exchange carrier that provides cable service through an open video system or a cable system shall not be required, pursuant to title II of this Act, to make capacity available on a nondiscriminatory basis to any other person for the provision of cable service directly to subscribers.[26]

Under Section 522 of the Cable Act, "cable service" is defined as:

> (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service[.][27]

The Telecommunications Act is clear on its face that an OVS operator is not required to make capacity available to any cable operator, and that the non-discrimination obligation with regard to carriage on its system extends only to VPPs.[28] Whether an OVS operator chooses to permit a cable operator to obtain capacity on its system is entirely within the discretion of the OVS operator.

Fifth, the OVS operator should be permitted to establish minimum and maximum limits on the capacity that an unaffiliated VPP may obtain. An unaffiliated VPP should not be allowed to obtain more than one-third of the channels in a given class (e.g., analog) where demand exceeds capacity. Otherwise,

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[25] Id. ¶ 15.

[26] Telecommunications Act, 110 Stat. at 119 § 651(b).

[27] 47 USC § 522.

[28] Telecommunications Act, 110 Stat. at 122 § 653(b)(1)(A).

OVS operators will be placed in the undesirable position of constructing an OVS system for the primary use of an unaffiliated third party. The OVS operator would be assuming all the risk, with limited opportunity for return. Very few, if any, parties would be willing to proceed with OVS under such circumstances.

Sixth, U S WEST urges the Commission to adopt rules that allow for the greatest discretion on the part of the OVS operator with respect to channel sharing, so long as all parties offering programming on shared channels and their respective subscribers are treated in an equal manner. Because of consumer demand, the OVS operator will have a natural incentive to ensure that subscribers have "ready and immediate access" to shared channels. In any event, an OVS operator should be permitted to require channel sharing to make the most efficient use of its network.

B. The Telecommunications Act's Non-discrimination Requirements Can Be Satisfied Through A Variety Of Channel Allocation Plans

The Commission asks for comment on whether it should design procedures to allocate OVS capacity where demand exceeds supply.[29] U S WEST urges the Commission not to waste its limited resources designing allocation plans. Nor should the Commission substitute its judgment for that of the OVS operator. USWC has invested a significant amount of time and effort in reviewing and evaluating different channel allocation plans in order to conduct its Omaha VDT trial. There is no single best means of allocating scarce channel capacity. No

[29] Notice ¶ 24.

purpose is served in requiring OVS operators to follow one approach. In Omaha, USWC used an approach that categorized channels as: common (unsecured non-interdictable channels), shared (secured interdictable channels available to more than one program packager), and non-shared channels (secured interdictable channels dedicated to a single provider).[30] The Commission found this approach to be both non-discriminatory and an efficient use of limited capacity.[31]

Despite this blessing by the Commission, USWC does not believe that its Omaha analog allocation plan is the only answer. USWC's plan was greatly influenced by existing technology, and it is quite likely that USWC would have proposed a different allocation plan under different circumstances. In constructing the Omaha VDT network, USWC used interdiction at the pedestal to allow programmers to enable end users to access video programming on analog channels. At the time, commercially available interdiction equipment was limited to 65 channels. Thus, 12 of the 77 usable channels were unblockable and available to any end user attached to the network. Given this fact, it is hardly surprising that USWC's allocation plan included 12 common channels available to everyone. USWC's allocation plan might have been quite different if different interdiction equipment had been commercially available or if USWC had used "side-of-the-

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[30] See USWC Amendment and Request for Modification, W-P-C-6868, filed Aug. 5, 1994.

[31] In the Matter of the Application of U S WEST Communications, Inc. For Authority under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain facilities and equipment to provide video dialtone service in portions of the Omaha, Nebraska service area, Order and Authorization, 10 FCC Rcd. 4087 (1995).

house" interdiction or set-top boxes. The point is that "one size does not fit all," and allocation plans can and should vary with the circumstances. The Commission should not attempt to establish rules in this area.

IV. OVS OPERATOR SELECTION OF PROGRAMMING IS ALREADY CONSTRAINED BY THE STATUTE AND SHOULD NOT BE FURTHER CONSTRAINED BY THE COMMISSION'S RULES

In various places throughout the Notice, the Commission seeks comment on when an operator should be deemed to have "selected" video programming for carriage on the system.[32] U S WEST submits that only programming that is the subject of a unilateral decision by the OVS operator or its affiliate should be classified as programming that is "selected" by the OVS operator. Any other interpretation would constrain an OVS operator's selection rights beyond the statutory one-third limit.

By requiring video programming to be shared (rather than duplicated on numerous channels), an OVS operator is not "selecting" programming as that term is used in Section 653(b)(1)(B) of the Telecommunications Act. In such an instance, the OVS operator has not "selected" the programming but only required that it be delivered in the most efficient manner, as the law allows. Furthermore, video programming that is jointly selected by video programmers (including an OVS operator or its affiliate) should not be deemed to be programming "selected" by the OVS operator.

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[32] Notice ¶¶ 19, 38 and 49.

U S WEST agrees with the Commission's tentative conclusion that public, educational and governmental ("PEG") and Must-Carry obligations should not be counted against the one-third that the OVS operator may select, if demand exceeds capacity.[33] The term "select" clearly implies choice, and the operator will have no choice but to comply with PEG and Must-Carry obligations. This means that the one-third allocation is made before PEG channels and local broadcast channels are assigned.

V. THE COMMISSION SHOULD SIMPLY CODIFY THE CABLE ACT REQUIREMENTS APPLICABLE TO OVS OPERATORS

The Act requires the Commission to impose PEG, Must-Carry and Retransmission Consent obligations on any operator of an open video system that are "no greater or lesser than" the obligations imposed on cable companies. The goal here, clearly, is regulatory parity. Some, if not all of these requirements, however, may be struck down on constitutional grounds. The simplest solution is to codify those requirements, as they currently exist in the Cable Act, as part of the OVS rules.

A. OVS Operators Should Have As Much Flexibility As Cable Operators To Develop Technical Solutions And Experiment With New Approaches To PEG Requirements

[33] Id. ¶ 19. U S WEST recognizes that Section 653(c)(2)(A) requires the Commission to impose PEG and Must-Carry obligations on OVS operators, but does not in any way concede the constitutionality of these requirements.

To the extent that cable operators have flexibility and discretion in how they implement PEG requirements, OVS operators should have the same flexibility and discretion. As indicated at various places in the Notice, delivery of PEG channels over OVS raises many technical issues.[34] For example, technical and cost constraints will make it very difficult to deliver PEG channels only to certain areas within an OVS territory. The same is true, however, on the cable side. Cable systems sometimes cross more than one franchise area, and the Commission has allowed cable operators to work out solutions on a system-by-system basis in cooperation with local franchise authorities. The Commission should give OVS operators the same flexibility and opportunity to develop solutions that make sense from a technical standpoint.

Furthermore, any rules the Commission might adopt with respect to PEG requirements could stifle experimentation with new approaches to the implementation of PEG requirements. Some communities (e.g., Cincinnati) have established non-profit organizations to manage public access programming independent of the local cable television ("CATV") operators, and all parties appear to have benefited from arrangements that have flowed from this innovative approach. The Commission should not adopt any rules that would limit the ability of OVS operators to work out with local government officials mutually acceptable arrangements for delivery of PEG channels, just as cable operators are able to do.

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[34] Notice ¶¶ 58-60.

Nor should the Commission foreclose or limit the ability of cable operators and OVS operators to work together to deliver PEG channels in the most efficient, cost-effective manner. To prevent duplication of investment, OVS operators should be permitted to interconnect with the cable operator's PEG channel feeds, and share in the capital and operating expenses related to PEG channels, as suggested in paragraph 57 of the Notice. This would benefit both operators and appears to be contemplated by other provisions in the Telecommunications Act.[35]

B. The OVS Operator Should Be Permitted To Require Other Programmers To Include "Must-Carry" Channels

As a practical matter, the only way an OVS operator can ensure that every subscriber receives the Must-Carry channels is to require unaffiliated VPPs to include the Must-Carry channels as part of their basic packages. As discussed above, U S WEST believes that this entry-level tier should not be counted as part of the OVS operator's selection and should be funded by a common formula applicable to all VPPs. The OVS provider or its designee would administer the entry tier on behalf of all VPPs. Administrative responsibilities would include negotiations with franchise authorities and CATV operators and responsibility to implement valid

[35] Section 652(d)(2) provides: "[A] local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that part of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration." Telecommunications Act, 110 Stat. at 120 § 652(d)(2).

syndicated exclusivity and sports blackout requests. This is basically the equivalent of the "common channels" in the USWC Omaha VDT trial.

C. Retransmission Consent Should Be Negotiated Separately By Each Video Programming Provider And Should Not Be An Option If The Broadcaster Elected Must-Carry In The Same Area

PEG channels and broadcast stations that elect Must-Carry can be managed in an OVS environment through the de facto "basic tier" described above. Retransmission Consent creates a more complex situation because negotiating Retransmission Consent with a broadcaster usually entails a complicated agreement that frequently includes marketing requirements and the programmer's agreement to carry additional programming, such as FX or America's Talking.

U S WEST recommends that the OVS operator administer the carriage of PEG and Must-Carry stations, but that once a broadcaster elects Retransmission Consent, the local broadcast station would then be considered a shared channel and each VPP would have to negotiate its own Retransmission Consent agreement. U S WEST further recommends that each broadcaster be required to elect either Must-Carry or Retransmission Consent in its dealings with all competing cable services providers (i.e. OVS operators and cable operators) so the broadcaster cannot unfairly leverage its negotiations with one operator against another.

VI. PROCEDURAL REQUIREMENTS SHOULD BE MINIMAL TO FULFILL CONGRESS' INTENT THAT OVS REGULATION BE STREAMLINED

A. No Formal Notice Is Necessary

U S WEST recognizes that non-discriminatory access requires that all video programming providers be given a full and fair opportunity to negotiate for channel capacity when capacity is limited. Prospective OVS operators should not, however, be burdened with any formal notice requirements as suggested in paragraph 14 of the Notice. Indeed, Congress specifically rejected a separate notice requirement.[36] Based on our experience in Omaha, U S WEST believes that most VPPs will learn about new potential opportunities through normal industry channels. In addition, the filing of an application for certification will serve as notice of a LEC's intention to establish an OVS.

If the Commission determines that separate formal notification is in the public interest, U S WEST contends that the requirement should be minimal. For example, the Commission could require that the OVS operator file a letter with the Chief of the Cable Bureau Services stating: (1) its intention to establish an open video system, and (2) the name, address and telephone number of a contact person. Upon publication of such a letter in the Commission's Daily Digest, it would then be

[36] A House Amendment sought to require OVS operators to notify the Commission of their intent to establish a video platform, and specified the format of the notification, but these requirements were NOT adopted in the final bill Congress passed on February 1, 1996.